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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of RICHARD and
MICHELLE RUSZAT.

RICHARD RUSZAT,

Appellant,

v.

MICHELLE RUSZAT,

Respondent.

G040253

(Super. Ct. No. 06D000332)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Salvador Sarmiento, Judge. Appeal dismissed.

David Chase for Appellant.

Law Office of Cisca Stellhorn and Cisca Stellhorn for Respondent.

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In this marital dissolution proceeding, Richard Ruszat (husband) purportedly appeals from an order denying his new trial motion. Husband contends the court improperly denied his request for a new trial based on his alleged physical disability (alcoholism) under the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.; the ADA). The order denying a new trial is not an appealable order. It is nevertheless reasonably clear that husband is trying to appeal from the underlying judgment on the ground the court should have continued the trial because his alleged disability prevented him from attending the hearing. Accordingly, we would ordinarily treat the notice of appeal as an appeal from the underlying judgment and review the ruling on the new trial motion in connection therewith. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

But we lack jurisdiction to conduct *any* appellate review. The underlying judgment was filed on December 5, 2007 and on December 6, 2007, the clerk of the court mailed a file-stamped copy of the judgment to the parties showing the date it was mailed. Accordingly, assuming no extensions apply, the notice of appeal had to be filed no later than February 4, 2008, sixty days after the clerk mailed the judgment. (Cal. Rules of Court, rule 8.104(a)(1) [“Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before . . . ; [¶] 60 days after the superior court clerk mails the party filing the notice of appeal . . . a file-stamped copy of the judgment, showing the date it was mailed”].)¹

The normal time for filing the notice of appeal was extended, however, by husband’s motion for new trial. (See rule 8.108(b)(1)(B) [“If any party serves and files a valid notice of intention to move for a new trial, the time to appeal from the judgment is extended for all parties as follows: [¶] (1) If the motion is denied, until the earliest of: [¶] . . . [¶] (B) 30 days after denial of the motion by operation of law”].) The court did

¹ All rules references are to the California Rules of Court.

not rule on the new trial motion until February 22, 2008. By that time, the court's power to rule on the motion had expired. A motion for new trial is denied by operation of law 60 days after the clerk gives notice of entry of judgment pursuant to Code of Civil Procedure section 664.5, or at the latest, 60 days after filing of the first notice of intention to move for a new trial. (Code Civ. Proc., § 660.)² Although the record does not contain a copy of husband's new trial motion, it must have been served before January 10, 2008, because on that date wife filed her papers opposing the motion. Thus, the court's power to rule on the motion expired no later than 60 days thereafter, on February 11, 2008.³ Pursuant to Code of Civil Procedure section 660, the new trial motion was denied by operation of law on that date. Accordingly, the deadline for filing the notice of appeal was no later than 30 days thereafter, on March 12, 2008. (Rule 8.108(b)(1)(B).) The notice of appeal was not filed until April 21, 2008. Accordingly, we lack jurisdiction to consider the appeal.

² Code of Civil Procedure section 660 provides: "[T]he power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial. If such motion is not determined within said period of 60 days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court."

³ The 60th day was February 10, 2008, which was a Sunday. The last day was therefore Monday, February 11, 2008.

DISPOSITION

Husband's appeal is dismissed. Wife shall recover her costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.